

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

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REPLY BRIEF FOR APPELLANT

Attorney for Appellant,
Mark Frasier



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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[U.S. ex rel.] MARK FRASIER, :

Appellant, :

- against - :

DOCKET NO.
75-2142

J. L. CASSELES, Superintendent :
of Great Meadow Correctional :
Facility, :

IN FORMA PAUPERIS

Appellee. :

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REPLY BRIEF FOR APPELLANT

Appellee's brief completely ignores or overlooks, as did the District Court, the vital distinction between due process in sentencing a convicted felon and due process in determining whether a presumed-innocent accused should be accorded the "critically important"* treatment as a Youthful Offender. Thus, the State relies (Brief, pp. 12-13, 16-17) upon authorities dealing with a field in which the United States is unique in the free world

*Kent v. United States, 383 U.S. 541, 556 (1956).

in giving the trial judge exclusive, non-reviewable, and unguided discretion in the sentencing function, Dorszynski v. United States, 418 U.S. 424, 441 (1974). Cases such as Menechino v. Oswald, 430 F.2d 403 (2nd Cir., 1970), involving parole are similarly distinguishable on their own rationale, since they differ from the pre-trial stage where "the state, in an adversary proceeding, is seeking to deprive a person of liberty, property or a status presently enjoyed" (430 F.2d at p. 411).

Where the State and the Court below go astray, it is submitted, is in failing to perceive or come to grips with the fact that in determining what is due process at any given stage the court must balance competing considerations. As the Supreme Court put it in Goldberg v. Kelly, 397 U.S. 254, 263 (1970):

"The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be condemned to suffer grievous loss [citation] and depends on whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication."

There are, of course, varying levels of procedure, from the full-blown adversary trial, with right to counsel, confrontation, cross-examination, etc., to more informal hearings. Thus in Dorszynski, it is true as pointed out by the Appellee

(Brief, p. 17), that the majority did not require reasons to be given for determining under the Youth Corrections Act that the juvenile would not benefit from treatment, but the Court did reverse because of the trial court's failure to make findings, to establish the fact of the court's having exercised its discretion, citing United States v. Williams, 407 F.2d 940 (4th Cir., 1968), United States v. Daniels, 446 F.2d 967 (6th Cir., 1971), and Yates v. United States, 356 U.S. 368 (1958), to the proposition that "[a]llthough well-established doctrine bars review of the exercise of sentencing discretion, limited review is available when sentencing discretion is not exercised at all." (41 L. Ed. 2d at p. 868). So, too, in Menechino, the vital distinction between full adversary proceeding and minimal standards of fair treatment was put thus in Judge Anderson's concurring opinion, agreeing that a hearing on parole revocation:

" . . . should not be turned into an adversary proceeding. This is not to say that the Board is entitled to act arbitrarily or base its decisions on careless or token investigation or on hunch or whimsey." (430 F.2d at p. 412)

It is submitted that the present case falls within that prohibition. Due process is not followed when an application for something as crucial as

Youthful Offender treatment is denied without any indication of the facts found by the Court and without any statement of reasons, from which it can only be concluded that the basis of the decision was nothing more than an arbitrary view of the seriousness of the crime charged.

Appellee argues (Brief, pp. 9-12) that interpretation of State law and review of the exercise of discretion are for the State courts. This is undoubtedly so, but where the State court interpretation results in a denial of due process, as here, that interpretation makes the law unconstitutional, and where the trial judge fails to exercise his discretion in a proper manner, or at all, a constitutional bar is interposed, Williams, supra; Daniels, supra.

The Youthful Offender statute here concerned fails to set any standards for considering Youthful Offender treatment, and the State courts have concluded that the trial judge may deny such consideration-- without holding a hearing or making findings or even giving a reason-- solely on the ground of the crime charged. Wholly ignored is the assumption of innocence so basic to our criminal justice system. Wholly overlooked is the likelihood that, as happened in the present case,

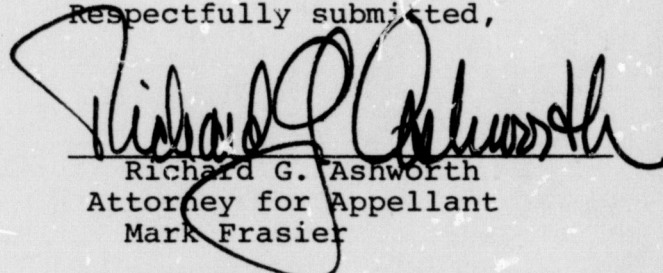
conviction will be for a lesser crime than that charged. Unanswerable, and at the very heart of this case, is the question of why this judge refused even to consider Youthful Offender treatment for an otherwise qualified youngster, upon the suggestion of the prosecution that it should be denied solely because of the crime charged. This does not, it is submitted, "satisfy the basic requirements of due process and fairness" Kent v. United States, 383 U.S. 541, 553 (1966), for how can an accused youth who has been denied this "critically important" treatment for no apparent reason-- no apparent constitutional reason-- obtain the "review by the appellate courts" which Appellee's brief acknowledges (p. 9) is his right, when there are no findings, or even reasons, to appeal from?

In a nutshell, appellant had no right to Youthful Offender treatment, but he did have a right, guaranteed by the United States Constitution, to a rational, fair procedure for determining whether he should be accorded such treatment. He was, however, denied such due process, and the State courts having not only failed to redress the wrong

but compounded it, this Court should hold that the arbitrary denial of Youthful Offender treatment was unconstitutional.

Dated: December 31, 1975

Respectfully submitted,

A large, stylized handwritten signature in dark ink, appearing to read "Richard G. Ashworth". The signature is written over the printed name and title of the attorney.

Richard G. Ashworth
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